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Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

NO. 249 1

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,

Petitioner,

vs.

EDWARD MOSTYN,

Plaintiff-Respondent,

vs.

S. H. GOLDEN COMPANY, INC.,

3rd-Party Defendant-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable The Chief Justice and The Associate Justices of the Supreme Court of the United States:

The Petitioner, Delaware, Lackawanna & Western Railroad Company, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered May 9, 1947 (R. 40)

OPINIONS BELOW

The opinions of the United States District Court for the Northern District of New York (Brennan, J.) which are not officially reported appear at R. 31 et seq.; 382 et seq.

The prevailing opinion of the Circuit Court of Appeals for the Second Circuit (Hand, J., concurred in by Clark, J.), which is not yet reported, appears in the Record at R. 399).

The dissenting opinion of that Court (Swan, J.), which is not yet reported, appears in the Record at R. 405).

SUMMARY STATEMENT

Plaintiff, Edward Mostyn, seeks to recover under the Federal Employers' Liability Act (45 U. S. C. A., Sections 51-59) * for personal injuries sustained by him when he was struck by a locomotive operated by the Delaware, Lackawanna & Western Railroad Company (to which reference will be made as the "Railroad") while he was asleep at the side of a track known as the west track (R. 3, 321). The Railroad interposed a cross-claim over against S. H. Golden Company, Inc. (to which reference will be made as "Golden") pursuant to the provisions of a written agreement between those parties, which so far as material was reduced to a written stipulation (R. 279-281, 284-287).**

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*Section 51 of that Act appears at p. 23 of the Appendix annexed hereto. The remaining sections of the Act are not pertinent.

**Stipulation appears in Appendix annexed hereto at pp. 24-25.

Following a trial presided over by Hon. Stephen W. Brennan at a Trial Term of the United States District Court, Northern District of New York, the plaintiff recovered a jury verdict of Ten Thousand Dollars ($10,000.00) against the Railroad (R. 370, 375). The jury found further that

Golden had been guilty of breach of contract and, accordingly, was liable over to the Railroad for the amount of the verdict (R. 375).

Upon appeal by the Railroad and Golden to the United States Circuit Court of Appeals for the Second Circuit that part of the judgment in favor of the plaintiff as against the Railroad was affirmed and that part of the judgment in favor of the Railroad over against Golden was reversed (R. 40

In order to present adequately the questions which it is sought to have reviewed by this Court, it becomes necessary to set forth the facts in greater detail than ordinarily would be necessary.

It appears from testimony which is not disputed, that pursuant to the contract to which reference has been made, Golden supplied the Railroad with a gang of men to do track maintenance work in the vicinity of Sherburne, New York (R. 90-91). Included in the group was the plaintiff (R. 90-91). Plaintiff had been doing track maintenance work for various railways since 1938 (R. 62). He commenced working for the Railroad in June, 1944, at Sherburne, New York (R. 89). After having remained on the job for ten or eleven days, he left his employment and went to Buffalo, New York, where he worked for a different Railroad (R. 89). Later in the month of June or in early July he returned to Sherburne and resumed his employment with the Railroad. At all times while working for the Railroad he lived at Sherburne in bunk cars maintained by Golden (R. 64, 89, 279-280). The plaintiff was not required by the Railroad to live there but had the privilege of staying wherever he pleased and could have lived comfortably in the Village of Sherburne, if he so desired (R. 92, 255, 276).

The plaintiff testified that on Thursday, August 10, 1944,

at about 3:30 o'clock in the afternoon he completed his work for that day and thereafter his time was his own (R. 80, 83, 98-99). From that time until the accident on Saturday, August 12, 1944, at about one o'clock in the morning, he did no work for the Railroad nor has he ever since (R. 64, 80). After he had completed his work on Thursday afternoon he decided that he would not work on Friday (R. 99-100). On Friday he attended to matters purely personal in nature, strolled around the Village of Sherburne and about five o'clock in the afternoon returned to the labor camp maintained by Golden (R. 80, 100-101). There he had his supper (R. 101). The plaintiff made no claim that he intended to do any further work for the Railroad after completing his work on Thursday and receiving his pay (R. 118).

At about 10:00 o'clock that Friday evening the plaintiff took a blanket from his bunk, spread it in front of a bench along the west track or west switch and went to sleep at a distance of about three feet from that track (R. 80-81, 108-109). Many places in the vicinity were at a safe distance from the track in question which the plaintiff could have selected with equal convenience (R. 117-118). Along this west track were several buildings and warehouses (Def. Ex. B, R. 224). At the site selected by the plaintiff there was a building not over six feet distant from the west track (R. 109). Between the west track and the main track of the Railroad, all running parallel and generally in a northerly-southerly direction, was a section of dead track south of the depot upon which were located the camp or bunk cars (R. 64-65, Def. Ex. B).

The plaintiff excused his failure to sleep in any of the bunk cars maintained by Golden by reason of the fact that such cars "were crawling with bedbugs" (R. 75-76). He

claimed that he had notified Mr. Mitchell, who was employed by and in charge of the camp for Golden, of that condition (R. 291, 306-310). Although during July and August, 1944, plaintiff saw cars on the west track and cars changed from time to time from that track to the main track of the Railroad, it is plaintiff's testimony that certain employees of the Railroad told him there would be no trains on the west track at night (R. 69-78). Plaintiff also asserted that Railroad employees advised him that it would be all right to sleep "outside" (R. 77-79). *The plaintiff admitted, however, that he had received no permission to sleep where he did* (R. 105-106). There is no substantial evidence that anyone other than the plaintiff on the night in question had ever selected that site in which to sleep.

Prior to one o'clock Saturday morning, August 12, 1944, as was its regular custom, the Railroad by means of a southbound freight train which operated between Utica and Binghamton was engaged in switching cars which were on the west track (R. 162 et seq., 177, 184, 189, 198, 227, 232). Three refrigerator cars had been placed on that track Friday morning, August 11, 1944, and were necessarily there at the time plaintiff selected that site in which to sleep (R. 237, 266). The following morning, Saturday, at the time of the accident the engineer was backing up pursuant to signals given with a lamp by a member of the train crew for the purpose of taking those cars from the west track to the main track (R. 260-261, 266). There is no proof that operations of the train were different than was customarily the procedure. The locomotive was traveling about two miles per hour and the headlight on the rear of the engine lighted up the tracks ahead in the direction the train was going for a distance of about eight hundred feet (R. 261). Patrick J. O'Connor, engineer of the locomotive involved,

had been employed in that capacity by the Railroad for twenty-five years (R. 258). As he proceeded—leaning out of the cab—he looked ahead in the direction the train was traveling (R. 262, 266-267). Neither he nor any member of the crew—who were at different stations on the engine attending to their duties—saw the plaintiff while he slept alongside the track (R. 168, 182, 191, 195-196, 201-202). The first indication that something was amiss was when the engineer heard a cry just opposite him as he was backing up the locomotive (R. 182). Mr. O'Connor immediately set his brakes and stopped the locomotive within a space of four to eight feet (R. 185, 187). He then discovered for the first time the plaintiff lying on the ground opposite the front end of the engine (R. 262-263). At the time plaintiff went to sleep and when the accident occurred he was fully dressed (R. 110-111). It was dark (R. 99). The engineer testified that he had never seen any man around the west track at night (R. 266). As a result of the accident plaintiff suffered the amputation of his right leg above the ankle joint (R. 83).

The foregoing recitation of facts omits all controversial issues and presents the evidence in a manner most favorable to the plaintiff.

BASIS OF JURISDICTION

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938 and under Federal Employers' Liability Act, 45 U. S. C. A., Ch. 2, Section 51 et seq.; Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

The judgment of the Circuit Court of Appeals for the

Second Circuit was entered May 9, 1947. That judgment was final and reversed in part the judgment of the District Court for the Northern District of New York, which was also a final judgment. Appropriate motions with adequate exception to the rulings of the Trial Court preserve the questions presented by the application herein (R. 45-46, 210-220, 312, 325, 355-378). The application to this Court for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is made within three months from the entry of said judgment.

QUESTIONS PRESENTED

Three questions are presented that the Petitioner seeks to have this Court review, which may be stated as follows:

1. May the plaintiff recover under the Federal Employers' Liability Act (45 U. S. C. A., Ch. 2, Section 51 et seq.) where the evidence is not disputed that for a period of over thirty-three hours he has performed no work or services for the Railroad by whom it is claimed he is employed and where there is no evidence that such plaintiff ever contemplated performing any further services or work for such Railroad and where the evidence is not disputed that the plaintiff was under no obligation to remain on the premises where the accident happened after his day's work was completed, merely by reason of the fact that such plaintiff sustained injuries while voluntarily sleeping at a site on the premises selected by him?

2. May the plaintiff recover under the Federal Employers' Liability Act (45 U. S. C. A., Ch. 2, Section 51 et seq.) in the absence of negligence on the part of the Railroad which is the proximate cause of the accident?

3. May the Court below refuse to recognize the clear and unequivocal terms of an indemnity agreement and deny recovery thereunder upon the mistaken theory that the decisions of the Court of Appeals of New York State require more definite language than that used; and may such decision stand where the Court below is in error as to the New York decisions?

SUMMARY OF REASONS FOR ALLOWANCE OF WRIT

The Petitioner will present as its reasons relied upon for the allowance of the writ:

1. That as a matter of law the accident and resulting injury to the plaintiff did not arise while he was acting within the scope of his employment and, accordingly, he does not come within the Federal Employers' Liability Act as amended in 1939 (45 U. S. C. A., Ch. 2, §§ 51-59). Research has failed to disclose any case other than the instant one where any Circuit Court of Appeals or this Court has gone as far as has the lower Court in the present case in ruling that after a period of more than thirty-three hours' abstinence from employment without any evidence of an intention on the part of the former employee to resume employment, recovery may be had under the Federal Employers' Liability Act; that this case presents a substantial and important Federal question which has not been, but should be, settled by this Court;

2. That as a matter of law the plaintiff failed to sustain the burden of proof that any negligence by the Railroad was the proximate cause of the accident yet recovery has been allowed against the Railroad despite the absence of

proof of any negligence; that such question is a substantial question which merits the review of this Court; and

3. That in the event plaintiff was entitled to recover against the Railroad, Golden was liable over under the indemnity agreement; that the Circuit Court of Appeals for the Second Circuit has misinterpreted the cases bearing on the question decided by the Court of Appeals of the State of New York and that such decision will lead to much confusion in the determination by the Federal Courts in the State of New York of the question thus involved; that such question which was left open by this Court in *American Stevedores, Inc. v. Porello, et al.* (not officially reported but reported in 67 Supreme Court Reporter—No. 9 at page 847) is squarely presented in this case; in that case this Court remanded the case for determination of the question while in the case at bar where the intention of the parties was clear the Court below reversed and dismissed the cross-claim; that the question thus presented is one of importance, not only in the State of New York, but in every state throughout the country; that it involves a type of agreement which is in universal use and presents a question of considerable public importance in the industrial world.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

1. As a matter of law the accident and resulting injury to plaintiff did not arise while he was acting within the scope of his employment and, accordingly, he does not come within the Federal Employers' Liability Act as amended in 1939 (45 U. S. C. A. §§ 51-59). Research has failed to disclose any case decided by this Court or decided by any United States Circuit Court other than the instant one, which has gone as far as the Court below in the case at bar.

Section 51 of the Act imposes liability upon any common carrier by railroad engaged in interstate commerce when by reason of the railroad's negligence, injury arises to one of its employees engaged in such commerce and employee is defined as one "any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth * *."

As previously pointed out, the remaining sections of the Act are not material to the questions presented by this petition.

It is important to note that after the plaintiff had completed his work and received his pay on Thursday, August 10, 1944, not only did he do no further work for the Railroad but there is no evidence that he ever planned to resume such employment. The only evidence in the Record is that plaintiff of his own volition did not work for the Railroad on Friday, August 11, 1944 (R. 80, 99-100). He was under no obligation to stay at the labor camp; his work—when working—did not require him to remain there; accommodations were conveniently available in the Village of Sherburne; plaintiff voluntarily selected what proved to be a dangerous site when safe and equally adequate places outside the alleged infested bunk car were at hand (R. 91, 92-93, 99-102, 112-113, 116-118, 255, 276). In those circumstances a determination that the plaintiff was engaged within the scope of his employment at the time of the accident and came within the provisions of the Federal Employers' Liability Act runs counter to every case on the subject heretofore decided by this Court. Nor has research disclosed that any United States Circuit Court of Appeals, other than the Court below in the case at hand, has gone as far as has the Court below in this case.

The 1939 amendment to the Act did not enlarge the provisions therein contained prior thereto so as to permit recovery where employment was lacking. Accordingly, cases on that question, both prior and subsequent to the amendment, are equally applicable herein. The rule is stated in *Sassaman v. Pennsylvania R. Co.*, (Third Circuit), 114 F. 2d 950, 952-954:

> "In other words, the employee's presence upon the premises where he receives his injuries must have been a necessary incident to the discharge of the duties of his employment. * * *
>
> "We accordingly concede that the plaintiff was not acting within the scope of his employment at the time he received his injuries and that, consequently, he was not employed in interstate commerce at that time. It, therefore, follows that he does not have a right of action under the Federal Employers' Liability Act."

Numerous cases apply the same rule. See

Chesapeake & O. Ry. Co. v. Bryant, 280 U. S. 404;

Young v. New York, N. H. & H. R. Co., (Second Circuit), 79 F. 2d 844, s. c., 74 F. 2d 251, 253;

Middleton v. Southern Pac. Co., (Fifth Circuit), 61 F. 2d 929, cert. den., 289 U. S. 736;

Stevenson v. Lake Terminal R. Co., (Sixth Circuit), 42 F. 2d 357-359;

Krysiak v. Pennsylvania R. Co., et al., (Third Circuit), 270 F. 758, 760;

Pryor v. Bishop, (Seventh Circuit), 234 F. 9, 14, 15, s. c., 265 F. 263, 264, cert. den., 254 U. S. 632;

and c. f.

Listorti v. New York Central R. R. Co., 251 N. Y. 327, 330.

If the Federal Employers' Liability Act is to be extended as far as has the Court below in the instant case, it is respectfully submitted that such determination should rest with this Court.

The Petitioner believes that the Circuit Court of Appeals in the instant case has rendered a decision which is in conflict with the decisions of the other Circuit Courts of Appeals on the same matter; it has decided an important question of Federal law in a way which probably conflicts with applicable decisions of this Court and has so far departed from the accepted and usual course of decisions on the question as to call for an exercise of this Court's power of supervision.

How far afield the prevailing opinion of the Circuit Court of Appeals for the Second Circuit in the present case goes is highlighted by the following excerpt from the dissenting opinion (Per Swan, J. R. 406):

> "During the night hours normally devoted to sleep the employee owes no duties to his employer; nor do the hours spent in sleep 'directly or closely and substantially affect such commerce,' even though he may work better after a night's rest. Hence I do not think the 1939 amendment should affect our decision. Mostyn was privileged to sleep in the bunk car (and a certain sum was deducted from his wages if he did so) but he was not required to sleep there; he could, if he wished, have rented a room in the nearby village as one of the track crew did. Therefore the question whether he was employed in interstate commerce during the night is no different than it would be had he been sleeping at a boarding house in the village or at his own home and suffered injury through the negligence of the railroad, as,

for example, by reason of the destruction of the house by fire caused by a defective spark arrester in a railroad engine. In my opinion he was not injured while he was employed in interstate commerce."

2. As a matter of law plaintiff failed to sustain the burden of proof that any negligence by the Railroad was the proximate cause of the accident yet recovery has been allowed him despite such lack of proof. The question thus presented not only is one of substance but the decision below is in conflict with applicable decisions of this Court and of decisions in the several Circuits. For the sake of brevity the facts involved will not be set forth in detail. It is enough, Petitioner believes, to point out that the plaintiff, an experienced railroad man, voluntarily selected a site in which to sleep only three feet away from the railway track. Although the plaintiff claimed he was told the west track was dead and not used at night, nevertheless, he admitted that he was never given permission to sleep alongside of the track and that he observed cars changed from time to time on that track (R. 69, 103, 105-106). Obviously the track was not dead and plaintiff had knowledge of that fact (R. 69, 103, 105-106, 244-245, 252-254). There is no substantial proof that anyone had ever slept near the track in question prior to the early morning of the accident. Neither the engineer nor any member of his crew had ever seen anyone sleep there prior to the accident. The plaintiff was not observed until he made outcry after he was struck. The Railroad could not reasonably foresee or anticipate that the plaintiff would be lying there asleep parallel to the tracks and thus, it is respectfully submitted, that as a matter of law there was no duty to perform any act which was omitted by the Railroad.

Liability under the Act or in circumstances applicable thereto uniformly has been denied employees as a matter of law for lack of proof of negligence upon facts no stronger than those in the instant case. See:

Brady v. Southern Ry. Co., 320 U. S. 476, 479, 480, 483-484;

Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 338, 339, 343;

Atlantic Coast Line R. Co. v. Davis, 279 U. S. 34, 39-40;

Davis, Agent v. Kennedy, 266 U. S. 147;

Pryor, et al., v. Williams, 254 U. S. 43;

Southern R. Co. v. Gray, 241 U. S. 333, 339;

Arkfetz v. Humphreys, 144 U. S. 418;

Fantini v. Reading Co., (Third Circuit), 147 F. 2d 543, 544, cert. den., 325 U. S. 856;

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Hoyer v. Central R. Co. of New Jersey, (Second Circuit), 255 F. 493, 497;

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Newport News & M. V. Co. v. Howe, (Sixth Circuit), 52 F. 362, 368-369;

and c. f.

Matter of Groszek, 262 N. Y. 478;
Connell v. N. Y. C. & H. R. R. Co., 213 N. Y. 352, 358-359.

3. In the event plaintiff was entitled to recover against the Railroad, Golden was liable over under the indemnity agreement which was treated by the prevailing opinion in the Court below as a New York agreement subject to the requirements of New York law. The lower Court recognized that the language of the agreement was sufficiently clear to cover the situation presented by the instant case (R. 483-484 [illegible] pp. [illegible]). The Court below in that opinion, however, erroneously concluded that this Court had just left open the interpretation of a *similar* contract in *American Stevedores, Inc. v. Porello* (not yet officially reported but reported in 67 S. Ct. 847). The prevailing opinion also held the erroneous view that for over ten years in a series of decisions by the New York State Court of Appeals the language contained in the subject agreement was not sufficient to indemnify the Railroad against its own negligence and that earlier cases decided by the New York State Court of Appeals which would have enforced liability against Golden were no longer applicable. Accordingly, that Court reversed that part of the judgment in favor

of the Railroad over against Golden, founded upon a jury verdict that Golden was responsible to the Railroad for the breach of such contract.

The determination thus made, not only fails to appreciate the difference in language between the contract in *American Stevedores, Inc. v. Porello*, supra, but misconstrues the cases decided by the New York State Court of Appeals upon which the Court below relied in reaching its determination. The prevailing opinion concluded (R. ~~182~~, 405) ~~Appendix pp.~~

> "In the case at bar more can be said for holding the Golden Company; and as a new question it is perhaps possible to come to the opposite conclusion. Be that as it may, New York decisions are authoritative for us."

Petitioner submits that the Court below has deprived the Petitioner of rights to which it is entitled under a solemn agreement and has added much confusion to the law of New York State with respect to indemnity agreements and liability thereunder based upon so-called "active" or "passive" negligence. It would unduly prolong the petition herein by pointing out the unequivocal language used in the agreement in the case at bar, which agreement appears in the Appendix annexed hereto and from which it may be readily observed that the language and terms are not similar to the contract in *American Stevedores, Inc. v. Porello*, supra.

The Petitioner believes—as did the United States District Court—that the subject indemnity agreement is plain and unambiguous and expresses in unequivocal terms that Golden will indemnify the Railroad against the latter's own negligence. All that was before the Circuit Court of Appeals in the instant case was the construction of an agree-

ment. Research by counsel for Petitioner has failed to disclose that the rule applicable in New York State is different from that applied in every state in the Union. There was no rule of public policy which prevented the Railroad from contracting with Golden for indemnity against any damages which the Railroad might be required to pay as a result of the ordinary negligence of its employees in operating engines and cars on the track in question. Use of unequivocal language to express such intention, however, does not mean that the intention must be expressed in terms. So it was held in *Buckeye Cotton Oil Co. v. Louisville & N. R. Co.*, (Sixth Circuit), 24 F. 2d 347, 348.

In each of the following cases the negligence of the indemnitee was not substantially different from the Railroad in the case at hand; the agreement did not contain express language indemnifying the indemnitee against his own negligence; the terms of the agreement were neither clearer nor broader than the subject agreement; yet it was held as a matter of law that the agreement indemnified the indemnitee against his own negligence:

Schwartz v. Merola Bros. Construction Corp., 290 N. Y. 145, 153-156, 157-159;

Turner Construction Company v. Rockwood Sprinkler Company of Mass., et al., 275 N. Y. 635 (See *De Haen v. Rockwood Sprinkler Co.*, 258 N. Y. 350);

Post & McCord, Inc. v. N. Y. Municipal R. Corp., 187 App. Div. 167, 173-175, affd. 230 N. Y. 540;

Long Island Railroad Co. v. American Bridge Co., 175 App. Div. 170, 172-174, affd. 225 N. Y. 692;

Westinghouse, Church, Kerr & Co. v. L. I. R. R. Co., 160 App. Div. 200, affd. 216 N. Y. 697;

Santa Fe, P. & P. R. Co. v. Grant Bros. Constr. Co., (per Hughes, J.), 228 U. S. 177, 188-194;

J. V. McNichols Transfer Co. v. Pennsylvania R. Co., (Sixth Circuit), 154 F. 2d 265, 266;

Cacey et al. v. Virginia Ry. Co., (Fourth Circuit), 85 F. 2d 976, 978; cert. den., 300 U. S. 657;

City of Cleveland, Ohio, v. Baltimore & O. R. Co., (Sixth Circuit), 71 F. 2d 89, 91;

Baltimore & O. R. Co. v. Youngstown Boiler and Tank Co., (Sixth Circuit), 64 F. 2d 638, 640;

National Transit Co. v. Davis, (Third Circuit), 6 F. 2d 729, 730-733, cert. den., 269 U. S. 579;

Standard Oil Co. of New Jersey v. United States et al., (Fourth Circuit), 264 F. 66, 69-70.

Some of the New York cases cited above are relied upon in the prevailing opinion in the Court below for reaching the conclusion that the language contained in the subject agreement is not sufficient to hold Golden liable over to the Railroad.

Typical of the cases cited in the prevailing opinion (R. 405 ~~406, Appendix p. ——~~) is that of *Semanchuck v. Fifth Avenue and 37th St. Corp.*, 1943, 290 N. Y. 412. The learned Court below failed to recognize, however, that the *Semanchuck* case and the other cases, for the most part, cited by it and upon which it relied to deny recovery in favor of the Railroad, dealt with the New York State Labor Law in which non-delegable duties were imposed upon the indemnitee. Contrary to the view of the Court below that cases such as *Long Island R. R. Co. v. American Bridge Co.*, 175 App. Div. 170; affd. 225 N. Y. 692 and *Turner Construc-*

tion Co. v. Rockwood Sprinkler Company, 249 App. Div. 508, affd. 275 N. Y. 635, no longer express the New York law on the subject and which cases support the Petitioner's claim for liability over under the subject agreement, those earlier cases have not been overruled by later cases and are still the law in New York State. Those earlier cases, such as many of the later cases, some of which have been cited above by this Petitioner, merely deal with a different subject or the construction of a different agreement.

We are not left in doubt on this problem or we would not take such a firm position—in deference to the opinion of the Court below. The last pronouncement by the Court of Appeals of the State of New York on the subject appears in *Wischnie v. Dorsch*, 296 N. Y. 257 (Adv. Sh. No. 419). There a unanimous Court said (page 261):

> "Premier moved at Special Term for an order to strike out and dismiss the cross complaint for insufficiency, which was granted and which has been affirmed by the Appellate Division. The dismissal was on the theory that the owner's omission to do a statutory nondelegable act, although out of possession, made it a joint tort-feasor along with the tenant in possession, as both owed a positive duty under the statute to keep the premises, including the elevator, in proper condition; and that failure to plead the existence of an unequivocal agreement by Premier to indemnify Brookman rendered the cross complaint insufficient to state a cause of action for recovery over, citing as authority our recent decision in *Semanchuck v. Fifth Ave. & 37th St. Corp.* (290 N. Y. 412).
>
> "In that case we concluded that, in construction and demolition projects, the statute imposed a 'positive' duty upon the owner and contractor alike (Labor Law, § 241); that it was an active, primary

> duty; and that any agreement to provide indemnity for concurrent failure to perform such duty must be 'unequivocally expressed', under the general theory that contracts 'will not be construed to indemnify a person against his own negligence unless such intention is expressed in unequivocal terms' (*Thompson-Starrett Co. v. Otis Elevator Co.*, 271 N. Y. 36, 41). *We also concluded, and it seems to have been overlooked, that we should not extend such rule to other fields not included in its scope* (*Labor Law, § 241*), *but leave those situations to be controlled by the rules and standards antedating the statute.*" (Italics supplied.)

Contrary to the prevailing opinion in the Circuit Court of Appeals that the earlier cases in New York State are no longer the law with respect to indemnity agreements, the case of *Long Island Railroad Co. v. American Bridge Co.*, supra, has been cited with approval in later cases including *Thompson-Starrett Co. v. Otis Elevator Co.*, 271 N. Y. 36, 42—one of the cases cited in the prevailing opinion as changing the law of the earlier cases in New York State—where the Court distinguished the *Thompson-Starrett Co.* case from the *Long Island Railroad Co.* case as follows:

> "The claim came, therefore, within the express terms of the contract of indemnity and its enforcement was proper despite negligence on the part of the indemnitee."

The following statement in *Cacey v. Virginia Ry. Co.*, supra, is equally appropriate to the present case:

> "It is contended on behalf of the defendants that the lease agreement did not indemnify the railway company for injuries occurring on its tracks and caused solely by the negligence of the railway employees, and that even if intended to indemnify

against claims for injuries to certain classes of persons the indemnity did not extend to the Stike claim.

When we read the indemnity clause and give to the words used the interpretation demanded by their plain, ordinary meaning, we are forced to the conclusion that the first contention on behalf of the defendants is not sound. The language used is broad, comprehensive, and without ambiguity. If the words used did not mean to indemnify against claims of the character of the Stike claim, then they mean nothing. There was no other class of claims that could be brought against the railway company against which to indemnify."

It would unreasonably extend this Petition to analyze the many cases on the subject so as to indicate how clearly erroneous has been the determination of the Circuit Court of Appeals in the present case with respect to its interpretation of the New York State cases on the subject. Enough has been shown for the purposes of this application, Petitioner believes, to establish that the Circuit Court has committed error which has resulted in depriving the Petitioner of rights to which it is entitled under the contract it made with Golden. Indeed, as recently as April 11, 1947, the New York State Court of Appeals by a unanimous Court upheld the right of an indemnitee to recover for his own active negligence under a contract no stronger than that involved in the present case. See *Langelotti v. City of New York, et al.*, 296 N. Y. (Mem.) 941 (Adv. Sh. No. 421). The result of the prevailing opinion by the Circuit Court of Appeals not only will tend to lead to confusion in that wide field of law relating to indemnity provisions but such determination is in conflict with the decisions of the highest Court of the State of New York upon which the Circuit Court of Appeals intended to rely and is in conflict with

every well-reasoned case that counsel for Petitioner has been able to find on the subject.

Petitioner respectfully submits that the Circuit Court of Appeals has rendered a decision in conflict with many decisions of other Circuit Courts of Appeals on the same matter; that it has decided an important question of New York law in a way which is clearly in conflict with applicable New York decisions; that it has decided an important question of Federal law which is in conflict with applicable decisions of this Court and has so far departed from the accepted and usual course of judicial decisions on the subjects presented in this case as to call for an exercise of this Court's power of supervision.

WHEREFORE, Petitioner prays that a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Second Circuit be granted.

Respectfully submitted,

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Counsel for Petitioner.

APPENDIX

STATUTE

"§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States and Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404."

STIPULATION

"It is stipulated between the D. L. & W. R. R. Co. and the S. H. Golden Company Inc. that on January 1, 1943 the Railroad and S. H. Golden Company Inc. entered into a contract for an adequate consideration which was in force and effect during the year 1944, including the months of June, July and August of that year, and that pursuant to the terms of said contract during those months the S. H. Golden Company Inc. maintained the labor camp referred to in the testimony in this case just south and west of the station at Sherburne, N. Y., and

It is further stipulated that pursuant to said contract the S. H. Golden Company Inc. agreed to furnish bedding, food, lodging and laundry service to the men who lived at the camp; and further to keep the said camp in a clean, neat, sightly, and sanitary condition, and to allow no nuisance to be created upon or in the vicinity of said camp.

It is stipulated further that the Railroad Company furnish for said camp the track, the cars, the permanent fixtures, including tables, chairs, and benches in the cars, together with light, water and fuel.

It is further stipulated that S. H. Golden Company Inc. agreed as follows: To be fully and wholly responsible for any and all loss of life or property or injury or damage to person or property of any person or corporation, including the parties hereto and their respective officers, agents and employees, which loss, injury or damage may be due to, arise out of, or result from or be in any way connected with the services to be performed by the contractor hereunder, or the performance or lack of performance thereof, or any act or omission of the contractor, its agents or employees in any way related thereto, and to indemnify and

save harmless the Railroad Company from and against any and all claims, demands, actions, judgments, awards of any kind, damages, losses, costs, expenses and liability of every name and nature (including all reasonable expenses which may be incurred by the Railroad Company in defending any such action, claim or demand) which may arise or result, directly or indirectly, from or by reason of any such loss, damage, or injury, or from or by reason of the failure of the contractor fully to keep, perform and fulfill each and every agreement and condition in this contract contained on its part to be kept, performed and fulfilled. The contractor further agrees to be fully and wholly responsible for injury to or death of its agents, employees, invitees, and licensees occurring on the premises of the railroad company in the vicinity of said camps, and to indemnify and save harmless the railroad company from and against any and all claims, demands, actions, judgments, awards of any kind, damages, losses, costs, expenses and liabilities of every name and nature (including all reasonable expense that may be incurred by the railroad company in defending any such action, claim, or demand) which may arise or result, directly or indirectly, from or by reason of such injury or death."

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Supreme Court of the United States

OCTOBER TERM, 1947.

No. 249

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,

Petitioner,

—*vs.*—

EDWARD MOSTYN,

Plaintiff-Respondent,

—*vs.*—

S. H. GOLDEN COMPANY, INC.,

3rd Party Defendant-Respondent.

OBJECTIONS TO GRANTING OF PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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—*vs.*—

S. H. GOLDEN COMPANY, INC.,

3rd Party Defendant-Respondent.

OBJECTIONS TO GRANTING OF PETITION FOR WRIT OF CERTIORARI.

Respondent, Edward Mostyn, respectfully objects to the granting of the petition for certiorari upon the following grounds:

1. The decision of the Second Circuit Court of Appeals accords with all controlling decisions of this Court and of other Circuit Courts of Appeal on the same questions.

2. The questions decided by the Circuit Court of Appeals are not new, they have all been set at rest by this Court.

3. The jury have found that the negligence of the Railroad was the proximate cause of the accident and the fault of the Railroad which caused the injury was active.

VICTOR LEVINE,
Counsel for Respondent.

BRIEF.

This case presents nothing new in construction of the Act of Congress under which the case comes. Every question has been many times elucidated by this Court. Only long established and well understood principles of law laid down by this Court for the facts as found by the jury, guided the Trial Court and the Circuit Court of Appeals.

The petitioner sets forth in Point I his reasons relied upon for the allowance of the Writ, "that as a matter of law the accident and resulting injury to plaintiff did not arise while he was acting within the scope of his employment and, accordingly, he does not come within the Federal Employers' Liability Act as amended in 1939 (45 U. S. C. A. §51-59)."

In Point 2, he states "As a matter of Law plaintiff failed to sustain the burden of proof that any negligence by the Railroad was the proximate cause of the accident.

There is no complaint of erroneous charge to the jury. The verdict accords with the overwhelming preponderance of evidence. The verdict was approved by denial of motion for new trial, and by the Circuit Court of Appeals. The case is within the rule laid down by the Court in Boehmer, petitioner, vs. Penn. Railroad Co., 252 U. S. 496:

> "Likewise we accept the concurrent judgment of the lower courts that the carrier was not negligent in failing to give warning concerning the use of the cars with handholds only at two diagonal corners. Whether this constituted negligence depended upon an appreciation of the peculiar facts presented, and the rule is well settled that in such circumstances where two courts

have agreed we will not enter upon a minute analysis of the evidence. Chicago Junction R. Co. v. King, 222 U. S. 222."

As a matter of Law the accident and resulting injury to plaintiff did arise while he was acting in the scope of his employment.

Modern United States Supreme Court railroad decisions interpreting the Federal Employers' Liability Act, which was originally adopted in 1906, but was reenacted on April 22, 1908, definitely outmode the harsh and partial judicially created doctrine heretofore pursued in a long list of old cases beginning in 1892 with Aerkfetz vs. Humphreys, 145 U. S. 418.

In 1939 Congress added to Sec. 4 of the Act a provision abolishing assumption of risk, where such injury resulted from the negligence of the railroad (Sec. 54) and by so doing, it also abolished the defense of non-negligence.

In 1939 Congress also amended Sec. 51 of Title 45 U. S. C. A. giving the benefit to any employee, any part of whose duties as such employee shall be in the furtherence of interstate or foreign commerce; or shall in any way directly or closely and substantially affect such commerce. The language used in this new provision is as broad in its scope as possible.

In conformity with the 1939 humanitarian amendment to the Federal Employers' Liability Act, the enlightened policy of the United States Supreme Court in several recent decisions has been to resolve all inferences in close and doubtful cases in favor of the injured railroad employee. I cite just a few of the cases which follow this view. (Tiller

vs. Atlantic Coast Line (1945) 323 U. S. 574; Tenant vs. Peoria & P. U. Ry. Co. (1944) 321 U. S. 29; Blair vs. Baltimore & Ohio R. Co. (1945) 323 U. S. 600.)

Today railroads must take precautions, some of which may seem to be physically impossible, in order to measure up to the high standard of care recently laid down by the United States Supreme Court. It is clear from the decisions that the Supreme Court is determined to permit recovery for the injured or deceased railroad employees and to place the responsibility for railroad accidents where it rightfully belongs.

There is no question that these late cases since the amendment of 1939 are in direct conflict with the earlier decisions of the United States Supreme Court. In the earlier cases, recovery was not permitted because the Court held, that the record left the matter of negligence in the realm of speculation and conjecture.

In Marceau vs. Great Lakes Transit Corp., 146 Fed. Rep. 2d. 416 (Circuit Court of Appeals 2nd Circuit, Jan. 9, 1945). Augustus N. Hand, Circuit Court Judge, held: "Under the decisions a man is acting in the course of his employment when coming to or returning from work, and upon the employer's premises or upon adjacent property if approaching by a customary route." (Citing Wong Bar vs. Suburb. Petroleum Transport, 119 F. 2d. 745.

In Erie R. R. Co. vs. Winfield, 244 U. S. 170, Supreme Court held: "That a railroad employee was engaged in interstate commerce and could recover for injuries sustained through the negligence of the railroad when incurred while leaving his work for the day and passing through the freight yard of the railroad." Judge Van Devanter said:

"It was a necessary incident of his day's work and partook of the character of that work as a whole."

In Virginian Ry. Co. vs. Early, 130 Fed. 2d. 548 (1942), the deceased before going to work went to the boarding house and lunch room of Sands & Co. for a cup of coffee. The lunch room was located in a building belonging to the railway company This restaurant was operated by arrangement with the railway company for the benefit and convenience of its employees and they were not obliged to deal with Sands & Co., but when they did so, the indebtedness incurred was deducted from their wages.

It is conceded that the scope of employment includes not only actual service, but also those things necessarily incident thereto, such as going to and from place of employment.

Chicago, M. & St. P. & P. R. Co. vs. Kane, 33 F. 2d. 866; Atlantic Coast Line R. Co. vs. Williams, 284 Fed. 262; Easter vs. Virginian Ry. Co., 76 W. Va. 383, 86 S. E. 37; Kinney vs. Baltimore & Ohio, 35 W. Va. 385.

It is also well established that a temporary stoppage of work for purposes which are necessarily incident to the life of an employee does not put an end to the relationship of employer and employee, since such an occurrence must have been within the contemplation of the parties. (North Carolina R. R. Co. vs. Zachary, 232 U. S. 248; 35 Am. Jur. Master & Servant, Sec. 172.

The Court held that the decisions above manifest a clearer understanding of the actual conditions of employment than those which seem to hold the strict view that any temporary departure from the performance of duty

suspends for the time being the relationship of employer and employee.

In Northwestern Pac. R. Co. vs. Industrial Accident Comm., 166 P. 2d. 334 (1946)—Employee was injured in a collision between an automobile and a taxicab furnished by the railroad, after terminating day's activities involving interstate commerce. The Court held that he was engaged in interstate commerce at the time of the accident. The Court further held that the purpose of the 1939 amendment to the Federal Employers' Liability Act was to eliminate the necessity of the Courts determining borderline cases.

In Chicago, M. St. P. & P. R. Co. vs. Kane, 33 Fed. Rep. 2d. 866—Kane was employed by defendant with a gang in surfacing and dressing its roadbed. He lived in a bunk car, furnished by the railroad and meals were furnished by a commissary concern under contract with the railroad, by the terms of which men were charged at a specified rate and same was deducted by the railroad from their pay checks and paid to the commissary. Across three tracks from the bunk cars were toilet facilities. Before Kane actually started work, he went from the bunk car to toilet and on his return was struck by a train belonging to the railroad company. The Court held: "Undoubtedly he was in railroad employ and his service was interstate. By the conditions of his employment, he was necessarily on railroad premises. The railroad contention seems to be predicated solely upon the consideration that he had not yet lifted a pick or stuck a shovel in the ground. But his employment was definite. The Court further held under the circumstances he was employed in interstate commerce within the Federal Employers' Liability Act."

In the following cases the Courts have held that the relationship of employer and employee existed and that the employee was engaged in interstate commerce and entitled to the protection of the Federal Employers' Act.

North Carolina Co. v. Zachary, 232 U. S. 248.

Virginian Ry. Co. v. Early, 130 Fed. 2d. 548.

Chicago, etc., v. Kane, 33 Fed. 2d. 866.

Judge Hand, L., in his opinion in this case says: "The question whether Mostyn was 'employed' within the meaning of the statute* divides itself into two parts: whether he had ended his engagement on Thursday night or on Friday morning, and had not resumed it before he was hurt; and, if he had not, whether he was 'employed' at all while he was asleep beside the track. The defendants argue that when he did no work on Friday and went to the village, he quit the job as he had in June, and that his return to the 'bunk cars' on Friday night was not a re-entry upon it. No doubt it was possible for the jury so to construe his conduct on Friday, but it was not necessary that they should, for the uncontradicted testimony of a fellow employee, Wood, was that when an employee meant to quit he went to Syracuse to get his last pay. It was possible to construe the arrangement to be that these casual workers were free to work or to take a day off at their pleasure, but that they were not to be understood to have quit the job merely because they did the second. If so, although Mostyn was not 'employed' on Friday while he was in town, when he came back that night to sleep he was as much and as little 'employed' as he would have been had he been work during the day. * * *

* §51, Title 45, U. S. Code.

It seems to us that when a railroad provides shelter or food or both for its employees, and they are using the accommodations so provided to prepare themselves for their work, or to rest and recuperate, they must be regarded as in its 'employ.' Unless that is true we are driven back to including only the very work itself with the addition of going to or away from it. While the amendment does not help textually towards a solution, it does impressively disclose an overall purpose to extend the scope of the statute. We think that to implement this purpose we must go at least as far back as the facts here before us; and we hold that, had Mostyn been sleeping in one of the 'bunk cars,' he would have been in the 'employ' of the railroad. If so, the fact that he was driven out because the cars were unfit for sleeping, made it reasonably foreseeable that he would seek a substitute; and a jury might find a nearby bed on the earth such a substitute on a hot August night."

That the Railroad Company itself was guilty of negligence, was borne out by the evidence. The evidence showed that the men of the "bunk cars" constantly crossed the west track and that their only exit was on that side. That the infrequency of the track's use was an assurance of safety. The men were advised that the west track would not be used during the night (R. 74).

The Railroad Company admits that at the time of the accident the engine was backing up and that the engineer did not ring a bell nor sound a whistle. The trainman failed to keep a careful watch when the engine was backing up. Even the most casual lookout would have discovered Mostyn lying where he was; and his contributory negligence in doing so was of course not a defense. Sec. 53, Title 45, U. S. Code.

The engineer testified that there was a reflection on both sides of the track from the light in the rear of the engine and that he saw the bench while he was backing up (R. 181, 183). The conductor of the train testified that the light on back of the engine illuminated the buildings on both sides of the tracks (R. 171, 201). There was also evidence by the trainman that he knew about the presence of the bunk cars in the Sherburne yards and had known that they were there for about two months before the accident and he had seen men using the bunk cars and in going to and from the cars (R. 165). No member of the train crew walked ahead of the engine (R. 169, 170, 184.)

In action under Sec. 51 of Title 45, U. S. C. A. (Railroads) Proof of negligence however slight, is sufficient to present a jury question. Tenant v. Peoria et al. (1943) 134 F. 2d. 860.

Where Track Supt. told members of track crew that train would operate on passing track rather than on main line, crew member was relieved of duty to keep lookout for trains. (Southern Ry. Co. v. Harpe, Ind. App. (1944) 153 N. E. 2d. 185.)

Carpenter vs. Kurn et al., 136 So. Western Reporter (2d) 997 at 1005 (In Smith vs. Gould, 110 W. Va. 579, 159 S. E. 53; 92 A. L. R. P. 28 etc.). "A plaintiff who has negligently placed himself or his property in a situation of imminent peril and is either unconscious of the situation, or unable to avoid danger, or both, may nevertheless recover damages of the defendant who negligently inflicts injury, if the defendant could have avoided the injury after discovering the plaintiff's peril."

In Cochran vs. Thompson, 148 S. West. Rep. 2d. 532—Railroad has right to expect a clear track on its private right of way as affecting liability for death of one struck by train while on track in open country, and the rule of waiver of right to expect a clear track may be applied only to places of limited extent such as are used for access to shops and work camps.

In Johnson vs. Sandy Valley & Elkhorn R. Co., 205 S. W. 576: "That they saw him may be established either by direct evidence or proof of facts showing that the circumstances and conditions were such that those in charge of train could not have failed to see him."

Saba vs. Ill. Central R. Co., 85 S. W. 2d. 429 at 432, Held: If the use of the tracks were such that trainmen knew that in all probability persons were at the time and place on or near the tracks, it was their duty to keep a lookout and so move the cars or train that persons would not be injured, and that failure to do so was evidence of wantonness and wilfulness.

Failure of engineer to give signal in that he backed the engine without first ringing bell was a violation of defendant's rules and was negligence. (Tenant vs. Peoria, 134 F. 2d. 860.)

See also Denver & Salt Lake R. Co. vs. Granier, 89 Pac. (2d) 245, and Grosse vs. Terminal R. of St. Louis, 29 N. E. (2d) 1018.

The petitioner has endeavored to make much of the fact that it was quite possible for the plaintiff to have lived in the Village of Sherburne instead of the bunk cars furnished by the railroad company. Such a suggestion is puerile in

view of the facts that in the kind of work done by the plaintiff, namely, repairing tracks of the company, and in the method of employment of plaintiff and others for this kind of work, they never live in any other place but the camp cars, also known as bunk cars. In this connection it was purely a question of fact for the jury to say whether this choice was more theoretical than real.

There was no proof in this case that there were quarters available in Sherburne in which this plaintiff could live.

From the foregoing authorities petitioner's claims that a new question under the Act has arisen, and that it has been decided contrary to authority, is untenable.

No purpose would be served by assuming jurisdiction herein, only to reaffirm doctrines already clarified here many times, and well established and understood.

I submit that the opinion and decree of the Circuit Court of Appeals is correct; that no good reason appears why this Court should assume jurisdiction. Mostyn was injured August 12, 1944.

Respectfully submitted,

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Petitioner,

—*vs.*—

EDWARD MOSTYN,

Plaintiff-Respondent,

—*vs.*—

S. H. GOLDEN COMPANY, INC.,

3rd Party Defendant-Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR THE 3RD-PARTY DEFENDANT-RESPONDENT, S. H. GOLDEN COMPANY, INC., IN OPPOSITION.

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Supreme Court of the United States

OCTOBER TERM, 1947.

NO. 249

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,

Petitioner,

—vs.—

EDWARD MOSTYN,

Plaintiff-Respondent,

—vs.—

S. H. GOLDEN COMPANY, INC.,

3rd Party Defendant-Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR THE 3RD-PARTY DEFENDANT-RESPONDENT, S. H. GOLDEN COMPANY, INC., IN OPPOSITION.

Opinions Below.

There were two opinions by Judge Stephen W. Brennan in the United States District Court for the Northern District of New York. Neither has been officially reported. They appear at R. 31-36 and at R. 382-388.

The prevailing opinion of the Circuit Court of Appeals for the Second Circuit, which was written by Judge Learned Hand with whom Judge Clark concurred, is not yet reported. It appears at R. 399-405. The opinion of Judge Swan, who dissented in part, appears at R. 405-406.

Jurisdiction.

The judgment of the court below was entered May 9, 1947 (R. 407). The petition for certiorari was filed August 8, 1947. This court's jurisdiction is invoked under Section 240 (a) of the Judicial Code, Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938.

The jurisdiction of the lower court was invoked by the plaintiff-respondent, whose action was against the petitioner, under the Federal Employers' Liability Act, 45 USCA 51-60, April 22, 1908, c. 149, Sections 1-10, 35 Stat. 65-66 as amended and added by Apr. 5, 1910, c. 143, Sections 1-2, 36 Stat. 291; Mar. 3, 1911, c. 231, Section 291, 36 Stat. 1167 and Aug. 11, 1939, c. 685, Sections 1-3, 53 Stat. 1404. The third-party defendant-respondent became a party through the commencement by the petitioner of a third-party action upon an indemnity agreement.

Statement of the Case.

The accident out of which this action arose occurred on August 12, 1944 (R. 48) at about one o'clock in the morning (R. 110). The plaintiff-respondent, hereinafter called Mostyn, was a trackman employed by the petitioner in the maintenance of its tracks (R. 62). While so employed, Mostyn lived in camp cars owned by the petitioner and located upon a temporary siding at Sherburne, New York (R. 64-65). The petitioner contracted [1] with the third party defendant-respondent, hereinafter called Golden, for the operation of these cars as living quarters (R. 285); and pursuant to the contract, Golden operated a kitchen and commissary, furnished bedding, and cleaned the cars. The petitioner deducted a fixed amount for board and lodging from the wages of employees who lived in the cars and paid these amounts to Golden (R. 86).

On the night of the accident, Mostyn did not sleep in his bunk at the camp but lay down, instead, in an area about five feet wide between a building and the nearer rail of a switch track (R. 109). This place was about opposite the car in which Mostyn had his bunk (R. 103) and about twenty feet from it (R. 224, Ex. B). He fell asleep and did not awaken (R. 81) until an engine, owned by the petitioner (R. 58) and backing down the switch track (R. 166) to pick up and remove certain refrigerator cars (R. 238), had so injured his right leg as to require amputation of his right foot (R. 92).

It was the claim of Mostyn that he was unable to sleep in his bunk car because it was infested with vermin and

[1] Infra, P. 6.

that upon complaint to the foreman of his work gang, an employee of the petitioner, he had been given permission to sleep outside upon the ground (R. 78). He claimed, too, that he had been assured by the foreman that the switch track was dead and that there would be no operation upon it at night (R. 74). He thus accounted for his sleeping at the ill-fated spot.

Mostyn began an action against the petitioner under the Federal Employers Liability Act, supra, to recover for his injury. His action was based solely upon the negligence of the petitioner in its operation of the engine which caused the injury (R. 15). The petitioner, by a third-party action, claimed indemnity from Golden upon the contract for the operation of the bunk cars. The contention was that, if vermin were in fact in the car and Mostyn recovered, Golden was liable over to the petitioner upon the indemnity provisions of the contract (R. 20-24).

The trial was by judge and jury. A $10,000 verdict in favor of Mostyn against the petitioner (R. 370), and a like verdict in favor of the petitioner against Golden upon the indemnity agreement (R. 375), were returned. Judgment was entered upon them (R. 389-390). Golden appealed to the Court below from the judgment and from the denials of motions it had made (R. 394-396). Insofar as it was adversely affected, the petitioner did likewise (R. 391-393).

The Court below, Judge Swan dissenting, affirmed the judgment against the petitioner (R. 399-407). It reversed, unanimously, the judgment against Golden and dismissed the third-party complaint (R. 399-407).

Question Presented.

The petitioner's action against Golden presents but a single question: Under the law of New York, do the indemnity provisions [2] of the contract between the petitioner and Golden provide for the indemnity of petitioner against the latter's liability to Mostyn, such liability having been occasioned by the petitioner's own active negligence?

Summary of Argument.

Golden submits that the petition, insofar as it seeks review of the reversal of the judgment against Golden by the court below, should be denied for the following reasons:

1. The question of the interpretation of the indemnity agreement is controlled by the law of New York. That law is that a contract of indemnity will not be construed to indemnify a person against losses arising out of his own active negligence unless such an intention is expressed in unequivocal terms. The loss for which the petitioner is seeking indemnity was occasioned by its own active negligence. The agreement does not provide in unequivocal terms for indemnity against such a loss. The decision of the Court below, therefore, is not in conflict with the applicable New York decisions.

2. Mostyn's action against petitioner and that of petitioner against Golden are separate, distinct and independent, as are the questions to which each has given rise. That part of petitioner's application which relates to the former action may be granted without granting that part which relates to the latter. Each part must be considered sepa-

[2] Infra, P. 7.

rately, therefore, and whatever merit there may be in the application so far as it relates to the Mostyn judgment adds nothing to the petitioner's application in the action against Golden.

ARGUMENT.

POINT I.

The decision of the Court below is not in conflict with the applicable New York decisions.

The provisions of the contract between Golden and the petitioner for the maintenance and operation of the camp cars were stipulated by counsel as follows (R. 285):

> "It is stipulated between the D. L. & W. RR. Co. and the S. H. Golden Company, Inc. that on January 1, 1943. the Railroad and S. H. Golden Company, Inc., entered into a contract for an adequate consideration which was in force and effect during the year 1944, including the months of June, July and August of that year, and that pursuant to the terms of said contract during those months the S. H. Golden Company, Inc., maintained the labor camp referred to in the testimony in this case just south and west of the station at Sherburne, N. Y., and
>
> It is further stipulated that pursuant to said contract the S. H. Golden Company, Inc., agreed to furnish bedding, food, lodging and laundry service to the men who lived at the camp; and further to keep the said camp in a clean, neat, sightly, and sanitary

condition, and to allow no nuisance to be created upon or in the vicinity of said camp.

It is stipulated further that the Railroad Company furnish for said camp the track, the cars, the permanent fixtures, including tables, chairs, and benches in the cars, together with light, water and fuel."

The indemnity agreement contained in the contract is this (R. 285-286):

"To be fully and wholly responsible for any and all loss of life or property or injury or damage to person or property of any person or corporation, including the parties hereto and their respective officers, agents and employees, which loss, injury or damage may be due to, or arise out of, or result from or be in any way connected with the services to be performed by the contractor hereunder, or the performance or lack of performance thereof, or any act or omission of the contractor, its agents or employees in any way related thereto, and to indemnify and save harmless the Railroad Company from and against any and all claims, demands, actions, judgments, awards of any kind, damages, losses, costs, expenses and liability of every name and nature (including all reasonable expenses which may be incurred by the Railroad Company in defending any such action, claim or demand) which may arise or result, directly or indirectly, from or by reason of any such loss, damage, or injury, or from or by reason of the failure of the contractor fully to keep, perform and fulfill each and every agreement and condition in this contract contained on its part to

> be kept, performed and fulfilled. The contractor further agrees to be fully and wholly responsible for injury to or death of its agents, employees, invitees, and licensees occurring on the premises of the railroad company in the vicinity of said camps, and to indemnify and save harmless the railroad company from and against any and all claims, demands, actions, judgments, awards of any kind, damages, losses, costs, expenses and liabilities of every name and nature (including all reasonable expenses that may be incurred by the railroad company in defending any such action, claim, or demand) which may arise or result, directly or indirectly, from or by reason of such injury or death."

The controversy between petitioner and Golden involves interpretation of the indemnity agreement. The petitioner contends that the agreement provides indemnity to it for the judgment obtained by Mostyn. Golden disagrees. Its contention is that the petitioner's liability to Mostyn arose out of the petitioner's own active negligence and that the parties did not intend by the agreement to safeguard the petitioner from the results of such negligence. The Court below agreed with Golden.

No argument has been made by the petitioner, as indeed none could, that there was not a finding of active negligence implicit in the verdict of the jury for Mostyn. The propriety of that verdict is not a matter of contest between the petitioner and Golden. When the court below affirmed the judgment for Mostyn, therefore, the issue for review in the third-party action was single and clear-cut: Did the agreement provide for the indemnification of the petitioner against losses occasioned by its own active negligence?

Resolving this issue, the court below determined and applied the New York law relating to the construction of indemnity contracts. In the words of its opinion, the court determined that law to be (R. 404):

> "* * * that if the indemnitee means to throw the loss upon the indemnitor for a fault in which he himself individually shares, he must express that purpose beyond any peradventure of a doubt."

Having thus stated the rule, the court reversed the judgment against Golden. By so doing, it found that the agreement lacked an unequivocal expression of the purpose the petitioner contended was evidenced in it.

The petitioner now urges that this decision of the court below is probably in conflict with the applicable decisions of the New York courts. It is not clear from the petition whether petitioner feels the court erred in determining or in applying the New York law. In either event, as is below demonstrated, the opinion of the petitioner is mistaken.

The New York law applicable to indemnity agreements is that such a contract will not be construed to indemnify a person against his own active negligence unless that intention is expressed in unequivocal terms. That this is the established rule in New York is beyond doubt.

Semanchuck vs. Fifth Ave. & 37th St. Corp. (1943), 290 N. Y. 412.

Schwartz vs. Merola Bros. Construction Co. (1943), 290 N. Y. 145.

Walters vs. Rao Electrical Equipment Co. (1942), 289 N. Y. 57.

Employers' Liability Assurance Corp., Ltd., vs. Post and McCord Inc. (1941), 286 N. Y. 254.

Thompson Starrett Co. vs. American Mutual Liability Insurance (1937), 276 N. Y. 266.

Thompson Starrett Co. vs. Otis Elevator Co. (1936), 271 N. Y. 36.

Petkinic vs. Marc Eidlitz & Son Inc. (1934), 266 N. Y. 437.

Manhattan Railway vs. Cornell (1891), 54 Hun. 292, aff. 130 N. Y. 637.

Amitrano vs. Board of Education, Sup. Ct. Kings Co. (1945), 55 S. (2) 535.

In the Schwartz case, the Court stated: (Italics supplied)

> "While the parties are free to contract as between themselves for the ultimate burden of liability due to negligence, yet in the absence of *explicit language* to the contrary, courts will not interpret an indemnity agreement as a promise by the indemnitor to save harmless the indemnitee on account of the active negligence of the latter. * * * Clearly the wording of the indemnity agreement in the case at bar is not sufficiently broad to require indemnification if the injury to the plaintiff can be charged to active negligence on the part of the Bank."

Not one of the New York cases cited by the petitioner questions this rule. Each of them was concerned with its application. Each falls into one of two groups according to the question it presented. In the first group are those

cases in which the active or passive nature of the indemnitee's negligence, if any, formed the issue; in the second, those cases in which the problem was whether or not the indemnity sought was promised in unequivocal terms.

The following of the cases[3] cited by the petitioner fall into the first group: *Schwartz v. Merola Bros. Construction Corp.*, 290 N. Y. 145, 153-156, 157-159; *Turner Construction Company v. Rockwood Sprinkler Company of Mass.*, et al., 275 N. Y. 635 (See *De Haen v. Rockwood Sprinkler Co.*, 258 N. Y. 350)[4] and *Post & McCord, Inc. v. N. Y. Municipal R. Corp.*, 187 App. Div. 167, 173-175, affd. 230 N. Y. 540. Indemnity was allowed in each of them only after a finding that the indemnitee had been guilty either of no negligence or of passive negligence.

Semanchuck v. Fifth Avenue & 37th St. Corp. (1943), 290 N. Y. 412,[5] to which the petitioner also refers, is in this group too. It illustrates a situation in which indemnity was denied because of the affirmative negligence of the indemnitee. The concern of the court with the New York Labor Law in that case was to determine if Section 241 thereof created a positive duty whose violation would constitute active negligence. This determination was necessary in order to apply the rule above set forth to the facts of the case. Nothing in the decision limits the application of the rule to cases in which Labor Law violations are present. Its inquiry was directed solely to whether common law standards of active or passive negligence could be applied to violations of Section 241.

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[3] P. 17, 18, Petition.

[4] See opinion in Appellate Division, 249 A. D. 509, and Dudar v. Milef Realty Corp., 258 N. Y. 415.

[5] P. 18, Petition.

The following of the cases[6] cited by the petitioner fall into the second group: *Long Island Railroad Co. v. American Bridge Co.*, 175 App. Div. 170, 172-174, affd. 225 N. Y. 692 and *Westinghouse, Church, Kerr & Co. v. L. I. R. R. Co.*, 160 App. Div. 200, affd. 216 N. Y. 697. Recovery by the indemnitee was permitted in each of them only after a determination that the indemnitor had unequivocally promised to indemnify for the consequences of the specific activity out of which the indemnitee's liability arose.

Wischnie v. Dorsch, 296 N. Y. 257 (Adv. Sh. No. 419) is also cited by the petitioner to demonstrate the error of the court below.[7] Such a demonstration is not made by this case. The court was testing upon a motion the sufficiency of a cross-claim for indemnity based upon common law principles. It held the cross-claim sufficient because the wrongdoing of the indemnitee, as set forth in the pleadings, did not constitute active negligence. The inquiry by the court into the nature of the indemnitee's negligence reaffirmed rather than questioned the rule applied by the court below.

The decisions of this Court and of the lower Federal Courts cited by petitioner[8] do not apply New York law and are not controlling in the instant case. A discussion of them is, therefore, unnecessary.

It is thus clear that the Court below did not err in determining the New York law applicable to petitioner's claim against Golden. And that it did not err in the application of such law is demonstrated by the *Petkinic* case, supra.

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[6] P. 17, 18, Petition.

[7] P. 19, Petition.

[8] P. 18, Petition.

The official report of the Petkinic case is somewhat sketchy. The facts are revealed in the record on appeal. Eidlitz was the general contractor and McGratty was a sub-contractor. The general contractor erected a temporary partition of plaster board and lumber but instead of fastening it correctly, merely leaned it against timbers or uprights where it might fall if pushed. The plaintiff was changing his clothes near the partition when employees of the sub-contractor negligently dislodged the partition, and it fell on the plaintiff. Plaintiff sued both contractor and sub-contractor and recovered a verdict against both. The general contractor moved for judgment over on his cross complaint, relying on the following indemnity agreement (fols. 574-576 of the record on appeal. Italics supplied):

> "The sub-contractor hereby assumes entire responsibility and liability for any and all injuries to any and all persons, including the sub-contractor's employees, and for any and all damage to property *caused by or resulting or arising out of any act or omission on the part of the sub-contractor under or in connection with the contract and/or the prosecution of the work thereunder*, and shall indemnify and save harmless the owner and general contractor from and against any and all loss and/or expense which they or either of them may suffer or pay as a result of claims or suits due to, because of or arising out of any and all such injury and/or damage, whether real or alleged, and the sub-contractor, if requested, shall assume and defend at his own expense any such suits."

The Trial Court said (fols. 857-858 of the record on appeal. Italics supplied):

> "Motion denied. Here the jury has found both of the defendants at fault and jointly responsible for this accident. If it were the purpose of that part of the agreement between Marc Eidlitz & Sons, Inc., as contractor, and McGratty and Sons, as sub-contractors, set forth in paragraph fourth of the answer, to hold the sub-contractor liable for the participating negligent acts of the employees of the general contractor, *certainly such a drastic extension of liability should not have been left to conjecture when without any difficulty it could have been expressed in clear and understandable English so that he who runs may read.*"

The general contractor appealed but the Appellate Division and Court of Appeals both affirmed the judgment without opinion. (241 A. D. 720, 266 N. Y. 437.)

POINT II.

A review of the judgment of the court below in favor of Golden is not required even if it be determined that a review of the judgment for Mostyn should be had.

Mostyn's action against the petitioner is based upon negligence and the Federal Employers' Liability Act, supra. The petitioner's action against Golden is upon contract and is governed by New York law. The questions in each are distinct and independent. The two actions might have been brought separately; it was only for convenience that they were tried together.

Golden expresses no opinion of the merits of the petition so far as it relates to Mostyn. It does urge, however, that whatever those merits may be, they add nothing to that part of the application which relates to Golden. And no sufficient reason for this Court's action appears in that part of the petition.

CONCLUSION.

The petition, so far as it relates to Golden, should be denied.

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